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In the Supreme Court of the United States

OCTOBER TERM, 1928.

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESTATEMENT OF THE CASE

The statement on page 2 of petitioner's brief as to the issue involved in this case is as follows:

> "The question presented in this case is whether an action on a bond given to stay the collection of a tax pending consideration of a claim in abatement is barred after expiration of the period of limitation prescribed by law on suits or proceedings for the collection of taxes."

It is respectfully submitted that this statement of the issue is incorrect and misleading and that a proper statement of the issue would be as follows:

> May an action on a bond given under Section 234 (a), 14 (a) of the Revenue Act of 1918, 'conditioned for the payment of any part of *such tax* found by the Commissioner to be due' be maintained when the Commissioner made no determination and found no tax to be due until after the run-

ning of the statutory period of limitation of the Revenue Acts? (Italics ours)

The issue may also be fairly stated as follows:

> Can the Commissioner of Internal Revenue in a case in which a bond has been given conditioned for the payment of any tax found by him to be due make a valid tax determination and thereby create a cause of action on the bond after the statutory period of limitation has expired, *especially* in view of Section 1106 (a) of the Revenue Act of 1926, which provides that the running of the statute of limitations shall not only bar the remedies for the collection of the tax, but will extinguish all tax liability?

The material portions of the Revenue Acts are set forth in the appendix to the brief.

The distinguishing feature of this case, which must not be lost sight of, is that the Commissioner of Internal Revenue made no determination of any tax nor found any tax to be due until after the period of limitation provided for in the Revenue Acts had elapsed. The Circuit Court of Appeals for the Seventh Circuit held, and we submit properly, that the statute of limitations was not suspended by the filing of the bond and that after the statutory period had elapsed, all tax liability was extinguished as much so as if it had in fact been paid. Consequently a subsequent determination of a tax by the Commissioner of Internal Revenue could not revive any tax liability; hence the obligation of the bond to pay a tax never attached and there has therefore never been a breach of the condition of the bond. The issue before this Court is not, therefore, what statutory period of limitation applies to actions upon such a bond as is here involved, but whether or not there has ever been a

breach of the bond when no tax was determined or found to be due prior to the time when all tax liability became extinguished.

The Government in its petition for a writ of certiorari admits on page 3 thereof that if no claim for abatement had been filed and the suit had been one to recover taxes, it would have been barred by the statute of limitations. It appears from the record in this case and the petition of the Government that the determination of the Commissioner of Internal Revenue relied upon as the basis for this action was made after the statutory period of limitation had elapsed, to-wit, on March 25, 1926. It is respectfully submitted, therefore, that the restatement of the issue here involved is necessary to the proper consideration as to whether or not the writ of certiorari should be granted.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE SHOULD BE DENIED FOR THE REASON THAT IT DOES NOT COME WITHIN ANY OF THE PROVISIONS OF RULE 38 (5) b OF THIS COURT.

(a) *In this case the Circuit Court of Appeals for the Seventh Circuit has not "decided an important question of Federal law which has not been, but should be, settled by this Court."*

The question involved in this case is of singularly narrow compass. The bond upon which the action was brought was given, as stated in the bond, pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918. This section of the Revenue Act of 1918 existed as the law of the United States only from February 14, 1919

to November 3, 1921, and by its terms applied only to taxable incomes received for the year 1918 or the corresponding fiscal year. The purpose of this provision was to permit sales and other information obtained in the year 1919 to be used in re-adjusting the value of 1918 inventories which suffered unusual fluctuations in value because of the termination of the World War and the change from war to peace time conditions in industry.

No provision similar to Section 234 (a), 14 (a) of the Revenue Act of 1918 has been incorporated in any subsequent statute. In order to take advantage of this unique provision a bond given pursuant to that section would have to be filed before payment of the tax disclosed by the 1918 return, that is, before payment of the last quarterly installment. A claim for abatement filed under Section 234 (a) (14) (a) and a bond given in conjunction therewith, are clearly intended to be part of the original return of the taxpayer and subject to all of the administrative rules and regulations and the limitation provisions for the determination of taxes shown on an original return. Such bonds are clearly different from bonds given to stay the collection of additional assessments made by the Commissioner for taxes claimed by him to be due in excess of those shown by the original return. In not one of the cases cited by the petitioner is such a bond in issue. Moreover, respondent is not aware of any similar case pending, nor has petitioner pointed out or even suggested that any other case is pending involving such a bond, as we have here, given under the terms of this unique statute. It is respectfully submitted, therefore, that a decision in an action brought upon a bond given pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918 would not be

final on the question of actions on abatement bonds in general because of the narrow scope and peculiar conditions giving rise to that unique provision of the Revenue Act of 1918 and bonds given pursuant thereto.

(b) *In this case the Circuit Court of Appeals for the Seventh Circuit has not rendered a decision in direct conflict with decisions of the Circuit Courts of Appeals or of the District Courts of the United States.*

In the petition of the Government on page 5 thereof it is admitted that there is as yet no conflict of decision between the United States Circuit Courts of Appeals on the question here involved. However, the Government cites the following cases in the District Courts which it contends are in conflict with the decision in this case:

United States vs. Onken Bros. Company, Inc., 23 Fed. (2d), (Wyo.) 367;

McCaughn vs. Philadelphia Barge Co., 27 Fed. (2d), (E. D. of Pa.), 628;

United States vs. Rennolds, 27 Fed. (2d), (S. D. of N. Y.), 902.

In the case of *United States vs. Onken Bros. Company, Inc.*, 23 Fed. (2d), (Wyo.) 367, it appears that a claim for abatement and a bond were filed with respect to an *additional assessment* of income tax for the year 1918. The Commissioner of Internal Revenue rejected the claim for abatement in June, 1923. Inasmuch as the return for the year 1918 would normally be filed on or before March 15, 1919, it clearly appears that the determination by the Commissioner was made before the 5-year statutory period of limitations had elapsed, and thus the Onken case vitally differs from the instant case, in which the Commissioner purported to determine

a tax after all tax liability had been extinguished by the running of the period of limitation prescribed by the Revenue Acts.

In the case of *McCaughn vs. Philadelphia Barge Co.*, 27 Fed. (2d), (E. D. of Pa.) 628, the Commissioner of Internal Revenue in October, 1920, made an *additional assessment* against the taxpayer on account of its 1918 income. The taxpayer filed a claim for abatement and the bond on which suit was brought. It appears that on May 14, 1923, the Commissioner of Internal Revenue rejected the defendant's claim for abatement and found the additional tax to be correct. Here again we find that the Commissioner of Internal Revenue made his determination of the tax due within the statutory period prescribed by the Revenue Acts, thus clearly distinguishing the case from the instant one.

In the case of *United States vs. Rennolds*, 27 Fed. (2d), (S. D. of N. Y.) 902, it appears that the income tax return in question was filed on March 31, 1918, and that a claim for abatement and a bond were filed in April, 1922. On November 8, 1923, the Commissioner of Internal Revenue rejected the claim for abatement and demanded payment of the tax. It appears that in this one case alone do we have the situation in which the Commissioner purported to determine a tax to be due after the elapse of the statutory period of limitation prescribed by the Revenue Acts. In the Rennolds case, however, the defendant does not appear to have raised the point that the Commissioner was without power to make a valid determination of a tax after all tax liability had been extinguished and that consequently no liability could arise on the bond because the condition

could not then be breached. The Rennolds case would appear to decide only that the statutory period of limitation prescribed by the Revenue Acts for existence of tax liability and the remedies for collection of taxes do not apply to an *action* upon a bond. Moreover, there are two additional distinctions between the Rennolds case and the instant case. First, the bond given in the Rennolds case was to stay the collection of an *additional assessment* and was filed long after the original return was filed. It was not a bond such as we have here filed under Section 234 (a) (14) (a) in conjunction with the original return. Second, in the Rennolds case the determination by the Commissioner of the claim in abatement and hence the amount due under the bond was had on November 8, 1923. This was more than two years before the passage of Section 1106 (a) of the 1926 Revenue Act, which act extinguishes all tax liability upon the running of the statute of limitation. Hence, in the Rennolds case it might fairly be argued that though the remedy for the collection of the tax was barred, the tax liability was not extinguished at the time of the determination. In the instant case the determination was made after the enactment of Section 1106 (a) and hence clearly after the tax had been extinguished by statute as effectually as if it had been paid.

It is respectfully submitted, therefore, that the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is clearly not in conflict with the case of *United States vs. Rennolds*.

The examination of these cases discloses that there is no such conflict between the decision by the Circuit Court of Appeals for the Seventh Circuit in the instant case and the decisions of the District Courts of the

United States as to warrant the granting of a petition for writ of certiorari in this case.

(c) ***The cases cited by the Government as being in accord with the decision in this case are likewise distinguishable and a decision by this court in United States vs. Maryland Casualty Company, No. 399, October Term, 1928, will decide the conflict in all of the cases cited by the Government and will not be affected by denial of the petition in this case.***

On page 5 of its petition the Government states that substantially the same question as is presented in the instant case has been certified to the Court by the United States Circuit Court of Appeals for the Ninth Circuit in the case of *United States vs. Maryland Casualty Company*, No. 399, October Term, 1928. With this contention respondent respectfully disagrees.

An examination of the certificate in that case discloses that the Commissioner in October, 1920, made an additional manufacturer's excise tax assessment for the period from March 1, 1919 to June 30, 1920. A claim for abatement was filed, together with a bond upon which the action was subsequently brought. The Commissioner of Internal Revenue considered the claim for abatement and rejected it on August 14, 1923. The determination of the tax due from the taxpayer was therefore made within the statutory period of limitation prescribed by the Revenue Acts, to wit, five years.

It is respectfully submitted, therefore, that the question raised in the instant case is not the same question nor substantially the same question presented in the certified case of United States vs. Maryland Casualty Company. There the Commissioner of Internal Revenue made a determination of existence of a tax liability with

in the period prescribed by the Revenue Act. Here, as stated before, the Commissioner attempted to make a determination of a tax after all tax liability had been extinguished by the running of the period of limitation prescribed by the Revenue Act.

In the case of *United States vs. Good Springs Anchor Company and Fidelity & Deposit Company of Maryland* (District Court for the Southern District of California, unreported), an examination of the complaint obtained by the respondent discloses the following situation to have been alleged by the Government: The Collector of Internal Revenue made an additional assessment against the defendant on account of its 1917 income. The taxpayer filed a claim for abatement on April 25, 1921. The claim was considered and rejected by the Commissioner of Internal Revenue on July 11, 1922, and due demand for payment therefor was made. Thereafter the taxpayer filed a bond, to-wit, on December 1, 1922, apparently to stay collection pending the reopening of the determination. It therefore appears that the bond was given to pay a fixed sum already determined by the Commissioner to be due, while in the instant case the bond was to pay such tax as might be determined by the Commissioner in the future. The determination by the Commissioner in the Good Springs Anchor Company case was within the statutory period prescribed by the Revenue Act and of course there can be no dispute as to his right or power to make such determination. In the instant case the purported determination was made by the Commissioner after the running of the period of limitation which extinguished all of the tax liability.

In the Maryland Casualty Company case certified to this Court, and also in the Good Springs Anchor Com-

pany case the decision was favorable to the taxpayer. However, the cases for the reasons given above are clearly distinguishable from the instant case and, therefore, although the taxpayer was successful in the last two cases discussed, it is respectfully submitted that they are not properly classed as being in accord with the instant case. In fact, if this Court takes jurisdiction of the certified case of United States vs. Maryland Casualty Company, No. 399, October Term, 1928, the decision in that case will terminate the conflict in all of the cases cited by the Government. This decision, however, by reason of the fact that in those cases, with the exception of the Rennolds case, supra, the determination by the Commissioner was made prior to the lapse of the statutory period of limitation, will not decide the issue in this case, and the denial of a writ of certiorari in the instant case will in no way affect the rights of the Government or the taxpayers in the case certified to this Court.

It is respectfully submitted, therefore, that there is no such conflict in the decisions of the Federal Courts as to require the granting of a writ of certiorari to the Government in this case, nor will the denial of such a writ affect the rights of the Government in the other litigation cited by it in its petition.

CONCLUSION

An examination of the facts and decisions by the Circuit Court of Appeals for the Seventh Circuit in the case of United States vs. John Barth Company, on the original hearing (R26) and upon rehearing (R30), shows that that case does not involve an important question of

general Federal law. The decision, it is respectfully submitted, is correct as to the legal principles applied and arises in a case under a section of the Revenue Act of 1918 affecting only income received during the fiscal or calendar year for 1918. Furthermore, the action is brought upon a bond given pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918, which was enacted by Congress to meet a particular situation arising by reason of the termination of the World War on November 11, 1918, and a similar provision does not appear to have been incorporated in Revenue Acts prior or subsequent to the Revenue Act of 1918.

An examination of the cases cited by the Government in its petition clearly discloses that they do not conflict with the decision in this case. Furthermore, the denial of a writ of certiorari in this case will not affect the rights of the Government in the certified case of United States vs. Maryland Casualty Company, No. 399, October Term, 1928. It therefore appears that the petition, which is predicated upon the alleged similarity of issues in certain cases pending and decided in the various district courts of the United States, is entirely incorrect in its major premise. The only thing that would be accomplished by granting the petition for writ of certiorari here is a decision of this particular case and of this particular tax. Such decision would affect no other cases and no other tax. Moreover, there is no likelihood of a future conflict in decisions, since no other similar case appears to be now pending in any of the district courts, and in addition, presumably none will arise at this late date on bonds under Section 234 (a) (14) (a) of the Revenue Act of 1918.

No attempt has been made to consider the merits of this case as we conceive that the argument and discussion thereon are proper only when and if this court takes jurisdiction by certiorari and not otherwise.

WHEREFORE, the respondents respectfully pray that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Sec. 234. (a) (14) (a) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18.)

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income."

Sec. 250 (d) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18)

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the re-

turn was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Sec. 250 (d) of Revenue Act of 1921. Act of Nov. 23, 1921. (42 Stat. L. 227, C. 136.)

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request there-

for by the executor, administrator, or other fiduciary representing the estate of such decedent."

Sec. 277 (a) (2) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234)

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234.)

"Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

Sec. 278 (c) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234.)

"This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or

proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Sec. 277 (a) (3) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27.)

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Sec. 278 (c) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Sec. 1106 (a) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."